

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHNATHAN PHAIR,

Defendant.

CASE NO. CR19-036 RAJ

STIPULATED
DISCLOSURE AND
PROTECTIVE ORDER

1. PURPOSES AND LIMITATIONS

Discovery in this action requires disclosure by the government of witness presentence investigation reports. These reports are generally confidential absent a court order permitting disclosure which sets forth the terms of such disclosure. In addition, discovery requires disclosure of internal records of the Federal Detention Center, including inmate rosters, records of offenses committed in the facility, and personal information of certain inmates. The parties agree that disclosure of all such private information requires special protection. Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated Disclosure and Protective Order. The parties acknowledge that this agreement is consistent with LCR 26(c). It does not confer blanket protection on all disclosures or responses to discovery, the protection it affords from public disclosure and use extends only to the limited information or items that are

entitled to confidential treatment under the applicable legal principles, and it does not presumptively entitle parties to file confidential information under seal.

2. “CONFIDENTIAL” MATERIAL

“Confidential” material shall include the following documents and tangible things produced or otherwise exchanged: Presentence Investigation Reports related to a witness in the case.

3. SCOPE

The protections conferred by this agreement cover not only confidential material (as defined above), but also (1) any information copied or extracted from confidential material; (2) all copies, excerpts, summaries, or compilations of confidential material; and (3) any testimony, conversations, or presentations by parties or their counsel that might reveal confidential material.

However, the protections conferred by this agreement do not cover information that is in the public domain, becomes part of the public domain through trial or otherwise, information contained in non-protected discovery disclosures, or information obtained through defense investigation independent of the private information covered by this order.

4. ACCESS TO AND USE OF CONFIDENTIAL MATERIAL

4.1 Basic Principles. A receiving party may use confidential material that is disclosed or produced by another party or by a non-party in connection with this case only for prosecuting, defending, or attempting to settle this litigation. Confidential material may be disclosed only to the categories of persons and under the conditions described in this agreement. Confidential material must be stored and maintained by a receiving party at a location and in a secure manner that ensures that access is limited to the persons authorized under this agreement.

4.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless otherwise ordered by the court or permitted in writing by the designating party, a receiving party may disclose any confidential material only to:

1 (a) the receiving party's counsel of record in this action, as well as employees
2 of counsel to whom it is reasonably necessary to disclose the information for this litigation;

3 (b) the defendant as long as only the information contained in the presentence
4 investigation report is disclosed by counsel to the defendant, but the defendant shall not be
5 provided with a copy of the witness's presentence investigation reports or internal records of the
6 FDC, and the defendant shall be informed that he is also bound by this order and may not re-
7 disclose information communicated to him;

8 (c) experts and consultants to whom disclosure is reasonably necessary for
9 this litigation and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit
10 A);

11 (d) the court, court personnel, and court reporters and their staff;

12 (e) copy or imaging services retained by counsel to assist in the duplication of
13 confidential material, provided that counsel for the party retaining the copy or imaging service
14 instructs the service not to disclose any confidential material to third parties and to immediately
15 return all originals and copies of any confidential material;

16 (f) the author or recipient of a document containing the information or a
17 custodian or other person who otherwise possessed or knew the information.

18 4.3 Filing Confidential Material. Before filing confidential material or discussing or
19 referencing such material in court filings, the filing party shall confer with the designating party,
20 in accordance with Local Civil Rule 5(g)(3)(A), to determine whether the designating party will
21 remove the confidential designation, whether the document can be redacted, or whether a motion
22 to seal or stipulation and proposed order is warranted. During the meet and confer process, the
23 designating party must identify the basis for sealing the specific confidential information at issue,
24 and the filing party shall include this basis in its motion to seal, along with any objection to
25 sealing the information at issue. Local Civil Rule 5(g) sets forth the procedures that must be
26 followed and the standards that will be applied when a party seeks permission from the court to

1 file material under seal. A party who seeks to maintain the confidentiality of its information
2 must satisfy the requirements of Local Civil Rule 5(g)(3)(B), even if it is not the party filing the
3 motion to seal. Failure to satisfy this requirement will result in the motion to seal being denied,
4 in accordance with the strong presumption of public access to the Court's files.

5 5. DESIGNATING PROTECTED MATERIAL

6 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each party
7 or non-party that designates information or items for protection under this agreement must take
8 care to limit any such designation to specific material that qualifies under the appropriate
9 standards. The designating party must designate for protection only those parts of material,
10 documents, items, or oral or written communications that qualify, so that other portions of the
11 material, documents, items, or communications for which protection is not warranted are not
12 swept unjustifiably within the ambit of this agreement.

13 Mass, indiscriminate, or routinized designations are prohibited. Designations that are
14 shown to be clearly unjustified or that have been made for an improper purpose (*e.g.*, to
15 unnecessarily encumber or delay the case development process or to impose unnecessary
16 expenses and burdens on other parties) expose the designating party to sanctions.

17 If it comes to a designating party's attention that information or items that it designated
18 for protection do not qualify for protection, the designating party must promptly notify all other
19 parties that it is withdrawing the mistaken designation.

20 5.2 Manner and Timing of Designations. Except as otherwise provided in this
21 agreement (see, *e.g.*, second paragraph of section 5.2(a) below), or as otherwise stipulated or
22 ordered, disclosure or discovery material that qualifies for protection under this agreement must
23 be clearly so designated before or when the material is disclosed or produced.

24 (a) Information in documentary form: (*e.g.*, paper or electronic documents
25 and deposition exhibits, but excluding transcripts of depositions or other pretrial or trial
26 proceedings), the designating party must affix the word "CONFIDENTIAL" to each page that

1 contains confidential material. If only a portion, or portions of the material on a page qualifies
2 for protection, the producing party also must clearly identify the protected portion(s) (e.g., by
3 making appropriate markings in the margins).

4 (b) Testimony given in pretrial proceedings: the parties and any participating
5 non-parties must identify on the record, during the deposition or other pretrial proceeding, all
6 protected testimony, without prejudice to their right to so designate other testimony after
7 reviewing the transcript. Any party or non-party may, within fifteen days after receiving the
8 transcript of the pretrial proceeding, designate portions of the transcript, or exhibits thereto, as
9 confidential. If a party or non-party desires to protect confidential information at trial, the issue
10 should be addressed during the pre-trial conference.

11 (c) Other tangible items: the producing party must affix in a prominent place
12 on the exterior of the container or containers in which the information or item is stored the word
13 “CONFIDENTIAL.” If only a portion or portions of the information or item warrant protection,
14 the producing party, to the extent practicable, shall identify the protected portion(s).

15 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to
16 designate qualified information or items does not, standing alone, waive the designating party’s
17 right to secure protection under this agreement for such material. Upon timely correction of a
18 designation, the receiving party must make reasonable efforts to ensure that the material is
19 treated in accordance with the provisions of this agreement.

20 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

21 6.1 Timing of Challenges. Any party or non-party may challenge a designation of
22 confidentiality at any time. Unless a prompt challenge to a designating party’s confidentiality
23 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic
24 burdens, or a significant disruption or delay of the litigation, a party does not waive its right to
25 challenge a confidentiality designation by electing not to mount a challenge promptly after the
26 original designation is disclosed.

1 6.2 Meet and Confer. The parties must make every attempt to resolve any dispute
2 regarding confidential designations without court involvement. Any motion regarding
3 confidential designations or for a protective order must include a certification, in the motion or in
4 a declaration or affidavit, that the movant has engaged in a good faith meet and confer
5 conference with other affected parties in an effort to resolve the dispute without court action.
6 The certification must list the date, manner, and participants to the conference. A good faith
7 effort to confer requires a face-to-face meeting or a telephone conference.

8 6.3 Judicial Intervention. If the parties cannot resolve a challenge without court
9 intervention, the designating party may file and serve a motion to retain confidentiality under
10 Local Civil Rule 7 (and in compliance with Local Civil Rule 5(g), if applicable). The burden of
11 persuasion in any such motion shall be on the designating party. Frivolous challenges, and those
12 made for an improper purpose (*e.g.*, to harass or impose unnecessary expenses and burdens on
13 other parties) may expose the challenging party to sanctions. All parties shall continue to
14 maintain the material in question as confidential until the court rules on the challenge.

15 7. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER
16 LITIGATION

17 If a party is served with a subpoena or a court order issued in other litigation that compels
18 disclosure of any information or items designated in this action as “CONFIDENTIAL,” that
19 party must:

20 (a) promptly notify the designating party in writing and include a copy of the
21 subpoena or court order;

22 (b) promptly notify in writing the party who caused the subpoena or order to
23 issue in the other litigation that some or all of the material covered by the subpoena or order is
24 subject to this agreement. Such notification shall include a copy of this agreement; and

25 (c) cooperate with respect to all reasonable procedures sought to be pursued
26 by the designating party whose confidential material may be affected.

1 8. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

2 If a receiving party learns that, by inadvertence or otherwise, it has disclosed confidential
3 material to any person or in any circumstance not authorized under this agreement, the receiving
4 party must immediately (a) notify in writing the designating party of the unauthorized
5 disclosures, (b) use its best efforts to retrieve all unauthorized copies of the protected material,
6 (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of
7 this agreement, and (d) request that such person or persons execute the “Acknowledgment and
8 Agreement to Be Bound” that is attached hereto as Exhibit A.

9 9. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED
10 MATERIAL

11 When a producing party gives notice to receiving parties that certain inadvertently
12 produced material is subject to a claim of privilege or other protection, the obligations of the
13 receiving parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This
14 provision is not intended to modify whatever procedure may be established in an e-discovery
15 order or agreement that provides for production without prior privilege review. The parties
16 agree to the entry of a non-waiver order under Fed. R. Evid. 502(d) as set forth herein.

17 10. NON TERMINATION AND RETURN OF DOCUMENTS

18 Within 60 days after the termination of this action, including all appeals, each receiving
19 party must return all confidential material to the producing party, including all copies, extracts
20 and summaries thereof. Alternatively, the parties may agree upon appropriate methods of
21 destruction.

22 Notwithstanding this provision, counsel are entitled to retain one archival copy of all
23 documents filed with the court, trial, deposition, and hearing transcripts, correspondence,
24 deposition and trial exhibits, expert reports, attorney work product, and consultant and expert
25 work product, even if such materials contain confidential material.
26

1 The confidentiality obligations imposed by this agreement shall remain in effect until a
2 designating party agrees otherwise in writing or a court orders otherwise.

3
4 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

5 DATED: March 15, 2019 /s/ André M. Peñalver
6 /s/ Matthew H. Thomas
7 Attorneys for United States of America

8 DATED: March 15, 2019 /s Michael Filipovic
9 Attorneys for Defendant Johnathan Phair

10 PURSUANT TO STIPULATION, IT IS SO ORDERED

11 IT IS FURTHER ORDERED that pursuant to Fed. R. Evid. 502(d), the production of any
12 documents in this proceeding shall not, for the purposes of this proceeding or any other federal or
13 state proceeding, constitute a waiver by the producing party of any privilege applicable to those
14 documents, including the attorney-client privilege, attorney work-product protection, or any other
15 privilege or protection recognized by law.

16
17 DATED: March 19, 2019

18 
19 The Honorable Richard A. Jones
20 United States District Judge
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1 EXHIBIT A

2 ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

3 I, _____ [print or type full name], of
4 _____ [print or type full address], declare under penalty of
5 perjury that I have read in its entirety and understand the Stipulated Protective Order that was
6 issued by the United States District Court for the Western District of Washington on March 19,
7 2019, in the case of *United States of America v. Johnathan Phair*, CR19-036RAJ. I agree to comply
8 with and to be bound by all the terms of this Stipulated Protective Order and I understand and
9 acknowledge that failure to so comply could expose me to sanctions and punishment in the nature
10 of contempt. I solemnly promise that I will not disclose in any manner any information or item
11 that is subject to this Stipulated Protective Order to any person or entity except in strict compliance
12 with the provisions of this Order.

13 I further agree to submit to the jurisdiction of the United States District Court for the
14 Western District of Washington for the purpose of enforcing the terms of this Stipulated Protective
15 Order, even if such enforcement proceedings occur after termination of this action.

16 Date: _____

17 City and State where sworn and signed: _____

18 Printed name: _____

19 Signature: _____